VERMONT DEPARTMENT OF LABOR AND INDUSTRY

RICHARD MURRAY	)	File No. T-1143
	)	
v.	)	By: Frank E. Talbott, Esq. Contract Hearing Officer
	)	
VERMONT HEATING AND VENTILATING	)	For: Barbara G. Ripley Commissioner
	)	
	)	Opinion No. 26-93WC

Hearing held in Montpelier, Vermont, on October 15, 1993.

APPEARANCES

Richard J. Wright, for the claimant
John P. Riley, for the defendant

ISSUES

1. Whether the Form 22 Agreement entered into between the parties and approved by the Commissioner on May 18, 1983, bars the claimant from receiving any further temporary total disability benefits.

2. Whether the claimant has been totally disabled for work since May 10, 1991, as a consequence of the injury on December 26, 1978, while in the employ of the Defendant.

3. Whether the medical bills for treatment beginning in 1991 are reasonable, necessary and causally related to the injury in this case, and, likewise, whether proposed medical treatment, including a suggested surgery, is reasonable and necessary.

4. Whether the Defendant's carrier, St. Paul Insurance Company waived its right to a set off under 21 V.S.A. § 624.

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. § 642 from May 10, 1991, to date.

2. Medical and hospital benefits under 21 V.S.A. § 640.
3. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. On December 26, 1978:

   a. The claimant, Richard Murray, was employed by the defendant, Vermont Heating and Ventilating, of South Burlington, Vermont, as a metalsmith.

   b. The defendant was an employer within the meaning of the Workers' Compensation Act.

   c. The claimant suffered a personal injury when he was unloading a truck, injuring his lower back.

   d. The claimant's injury arose out of and in the course of employment with the defendant.

   e. The St. Paul Insurance Company was the workers' compensation carrier on that date.

   f. The claimant had 5 dependents under the age of 21, identified as:

      i. Tammy C. Murray, born 12/10/64;
      ii. Theresa A. Murray, born 2/4/69;
      iii. Richard P. Murray, born 4/20/70;
      iv. David F. Murray, born 12/10/71;
      v. Tracy E. Murray, born 8/28/72.

2. The defendant and the claimant executed a Form 21 Agreement indicating that the claimant's weekly compensation rate was $206.00, including $5.00 for each dependent.

3. On May 18, 1983, the claimant and the defendant entered into an Agreement for Permanent Partial Disability Compensation (Form 22) in which the defendant agreed to pay the claimant as a result of a back injury causing 50 percent permanent impairment to the claimant's back, 165 weeks of compensation.

4. When compensation ceased in approximately October, 1985, the defendant, or its insurer, had paid a total of $30,468.87 in temporary total disability compensation benefits, $48,345.00 in permanent partial disability compensation benefits, $4,565.00 in medical benefits and hospital benefits.

5. On August 13, 1991, the claimant filed a Notice and Application for Hearing, requesting additional temporary total disability compensation and medical and hospital benefits.

6. The defendant, or its workers' compensation carrier, notified the claimant that it was denying his claim for compensation

because of a claimed right of set off resulting from a settlement of a third-party action.

7. On July 1, 1990, the claimant's compensation was increased under 21 V.S.A. § 650(d) to $373.00; on July 1, 1991, to $395.00; on July 1, 1992, to $407.00.

8. Judicial notice may be taken of the following documents in the Department's file:

Form 1	:	Employer's First Report of Injury
Form 25	:	Wage Statement
Form 10	:	Certificate of Dependency
Form 21	:	Agreement for Temporary Total Disability Compensation
Form 28	:	Notice of Change in Compensation Rate
Form 27	:	Notice of Intention to Discontinue Payments
Form 22	:	Agreement for Permanent Partial Disability Compensation
Form 6	:	Notice and Application for Hearing
Form 13	:	Affidavit of Compensation

FINDINGS

1. Stipulations 1 through 7 are true.

2. During the hearing the following exhibits were admitted into evidence:

Claimant's Exhibit 1	:	Booklet containing medical records, Decision of the Social Security Administration and Affidavit regarding legal fees
Claimant's Exhibit 2	:	Transcript of the deposition of David Keller, M.D.
Claimant's Exhibit 3	:	Disbursal sheet regarding settlement
Defendant's Exhibit A	:	July 30, 1985 letter from Jeannine Wood to Attorney Richard Wright
Defendant's Exhibit B	:	Vouchers for two $10,000.00 checks
Defendant's Exhibit C	:	Not Admitted (see below)
Defendant's Exhibit D	:	Medical Records

Defendant's Exhibit E : Vocational Rehabilitation records from September 25, 1981 to January 24, 1983

Defendant's Exhibit F : Affidavit of Compensation

3. During the hearing the following exhibit was offered but was not admitted pursuant to objection:

Defendant's Exhibit C : Memorandum by St. Paul Insurance adjuster dated July 16, 1985

4. Dr. David Keller began seeing the claimant on February 4, 1981. At that time the claimant was diagnosed as having spondylolisthesis of the L5 - S1 junction of the vertebra. On April 10, 1981, a spine fusion from the 4th lumbar vertebra to the sacrum was performed. On March 17, 1982, a repeat lumbosacral fusion was done because of the failure of the first surgery to create a solid union.

5. Dr. Charles B. Rust examined the claimant on October 6, 1982, approximately six months after the second surgery, and concluded that the claimant had pseudarthrosis resulting from failure of the second surgery. Dr. Rust also concluded that the claimant could not do any work requiring appreciable lifting or bending, and that the claimant's condition was permanent. He concluded that the claimant would probably continue with some symptoms in his back in the future, and had an overall loss of use of his back of 40 to 45%. Dr. Keller agreed with this assessment at that time, and indicated that the reason the claimant's fusion may not have been solid was because the claimant had taken off his body cast during the healing period. Dr. Keller did believe that it was too early to determine the extent of the nonunion.

6. On October 14, 1982, Dr. Keller released the claimant to return to work under restrictions of no bending or lifting greater than 30 pounds.

7. Dr. Keller gave a similar assessment on January 24, 1985, when he reported that the claimant was able to work, but without bending or lifting. However, at that time, Dr. Keller believed that x-ray films showed an adequate fusion. The claimant was assessed as having a 30-35% permanent impairment of his lumbar spine.

8. The claimant was laid off at Vermont Heating on July 10, 1986, as part of a general reduction in the work force.

9. On July 14, 1986, the claimant returned to Dr. Keller complaining that he could not work. Dr. Keller found this surprising and referred the claimant to University Orthopaedics.

10. The claimant was seen by Dr. Dorothy Ford of University Orthopaedics on July 23, 1986. The claimant reported to Dr. Ford that the reason he came to see her was to obtain an opinion of disability so that he could receive Social Security Disability. She did not diagnose the claimant as unable to work. In fact, she reported, "I suspect that he would not be in any physician's office today if he had not been fired."

11. Between July, 1986, and May, 1991, the claimant sought no treatment from Dr. Keller or University Orthopaedics relating to his back injury.

12. Between July, 1986 and May, 1991 the claimant worked at a variety of jobs. He could not remember exact dates of employment or the sequence of employment. His employers during this time period included: B.E. McGee where he worked as a sheet metal fabricator; H & M Drywall, which was his own business; New England Air, where he worked as an installer of heating and ventilating systems; Birch Hill Construction, installing various fixtures; and H.B. Slate Products where he oversaw other employees.

13. According to the claimant, none of these jobs required heavy exertion. They were mainly supervisory jobs.

14. In January, 1991, the claimant was laid off from H.B. Slate Products as part of a seasonal layoff. The claimant applied for and received unemployment benefits during this lay off. In May, 1991, the claimant learned that he would not be rehired by H.B. Slate. Therefore, he decided to pursue Social Security Disability benefits.

15. On May 21, 1991, the claimant returned to Dr. Keller, saying that he had increased pain in his back and was forced to give up his job six months earlier because of his back problem. Dr. Keller referred the claimant to the Spine Institute of New England. Dr. Keller also had a Myelogram and CT Scan done at Rutland Regional Medical Center. These resulted in reports of pseudarthrosis of fusion at L4 to the sacrum. Based upon this diagnosis, Dr. Keller prescribed a Boston brace which was supplied by Yankee Medical.

16. The claimant was seen by Drs. Stanley Grzyb and Leon Grobler at The Spine Institute of New England. His first visit was on July 10, 1991. These physicians had an MRI conducted and as a result confirmed the diagnosis of pseudarthrosis and recommended surgery.

17. Dr. Keller currently believes that the claimant's pseudarthrosis is not related to any intervening trauma. He is not sure why the fusion is not solid, and does not know if the nonunion dates back to the second surgery in 1982, or whether it failed sometime after that. While Dr. Keller had x-rays performed on the claimant's spine in 1985 to determine whether the fusion was solid, and concluded at that time that the fusion was "adequate", Dr. Keller acknowledges that the failure in the fusion may not have been visible on this x-ray even though it may have existed since the surgery in 1982.

18. The claimant believes that he has never received significant relief of his back pain since the second fusion in 1982. Given Dr. Keller's inconsistency in his statements as to whether the pseudarthrosis was corrected by the 1982 surgery, and the apparent accuracy of Dr. Rust's diagnosis in October, 1982, that the pseudarthrosis resulting after the 1981 surgery was indeed not corrected, and the claimant's continued pain since the surgery of 1982, it is more likely than not that the pseudarthrosis has existed since 1981 and was not corrected by the 1982 surgery.

19. None of the physicians seen by the claimant have said that the claimant is unable to work under the same restrictions given him after recovery from his surgery in 1982.

20. The medical services and supplies received by the claimant are clearly related to the injury in this matter. The claimant's treatment beginning in 1991 was necessarily related to diagnosis and formulation of possible treatment of the claimant's pseudarthrosis. The defendant does not dispute the reasonableness of the charges for these services and supplies.

21. The unpaid bills for medical services and supplies which are reasonable and necessary are:

Rutland Regional Medical Center:	$1,857.13
Mid-Vermont Orthopedists, Inc.:	276.00
University Health Center:	637.00
Medical Center Hospital of Vermont:	590.20
Yankee Medical, Inc.:	1,161.44

22. The claimant initiated a third-party lawsuit arising out of this incident. This lawsuit resulted in a settlement payment of $70,000.00 by the responsible third-party. $20,000.00 of the settlement proceeds were paid to the defendant's carrier in this workers' compensation matter, $25,000.00 was paid to the claimant's attorneys for fees and costs, and $25,000.00 was paid to the claimant. Settlement was reached in approximately August, 1985.

23. At the time of settlement, St. Paul Insurance Company had paid to claimant $83,378.87 in benefits under the Workers'

Compensation Statute. The carrier agreed at that time to compromise its lien for this amount and accept $20,000.00 as full payment of that lien.

24. Attorney Richard J. Wright, counsel for the claimant, wrote to the Department of Labor and Industry on August 12, 1985, setting forth the claimant's understanding of the agreement with the carrier as regards the carrier's lien and affect of the settlement on future benefits under the Workers' Compensation Statute. In that letter, Attorney Wright said, "Future benefits will continue, however, under the agreed settlement with St. Paul Insurance Company and Mr. Murray would continue to be entitled to all future benefits envisioned by that agreement which was approved by the Commissioner. In other words, the settlement of the third party action would not in any way affect future benefits." A copy of this letter was sent to the carrier. The carrier did not respond to this letter. The carrier denies that it made this agreement as to future benefits.

25. The claimant received Vocational Rehabilitation only until 1983, when it was "put on hold" by the carrier. Given the record in this matter, there is no reason why vocational rehabilitation services should not continue.

CONCLUSIONS

1. The claimant has the burden of proof in establishing his injury and disability. King v. Snide, 144 Vt. 395, 399, 479 A.2d 752 (1984).

2. A Form 22 Agreement is equivalent to an award by the Commissioner. Such an award is final as to all matters settled therein, unless there is fraud, and is conclusive between the parties unless factors under 21 V.S.A. §668, Modification of Awards, are proved. 21 V.S.A. §650(c) provides that when temporary disability occurs in separate intervals, compensation shall be adjusted for each recurrence of disability.

3. In this case, the claimant is not seeking to modify the Agreement for Permanent Partial Disability Compensation of May 18, 1983. Rather, the claimant asserts that he had a recurrence of temporary disability due to his injury, and this period of temporary disability occurred after the date of the Form 22 Agreement. Therefore, the Form 22 Agreement executed in this matter does not bar the claimant from receiving any further temporary total benefits.

4. The claimant is entitled to temporary disability benefits if the injury causes total or partial disability for work. 21 V.S.A. §642. Temporary disability benefits are provided only during the period between the initial injury and the final recovery. Bishop

v. Town of Barre, 140 Vt. 564, 442 A.2d 50 (1982). In the absence of a recurrence, once the recovery process has ended, or the worker has achieved the maximum possible restoration of his earning power, he is no longer entitled to temporary disability benefits.

5. Total incapacity for work is determined on a standard of whether the claimant is capable of performing any kind of available work. Hotaling v. St. Johnsbury Trucking Co., 153 Vt. 581, 572 A.2d 1351 (1990). As the claimant's pseudarthrosis has apparently not changed since the second operation in 1982, the claimant has been able to perform light duty work since 1982, and none of his physicians have said that he is incapable of continuing the sort of light duty work he has been doing since 1982, the claimant is not entitled to temporary disability compensation. However, as his physicians have said that he should have the nonunion repaired, and this surgery is reasonable and necessary, he would be entitled to temporary compensation from the time he began treatment for surgery and continuing until he reaches maximum medical improvement after the surgery.

6. The Defendant is obligated to pay all medical expenses that are reasonable and necessary and related to treatment of the compensable injury. 21 V.S.A. §640.

7. 21 V.S.A. §624(e) provides that in a third-party liability lawsuit arising out of a compensable injury, the employee may recover the full amount of his damages, but the proceeds thereof "shall first reimburse the employer or its workers compensation insurance carrier for any amounts paid or payable under this chapter to the date of recovery, and the balance shall forthwith be paid to the employee ... and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits."

8. The claimant asserts that the carrier waived its right under §624 to set off any future payments against the $25,000.00 settlement proceeds paid to the claimant. Waiver is an intentional relinquishment of a known right, involving both knowledge and intent. Liberty Mutual Insurance Co. v. Cleveland, 127 Vt. 99, 241 A.2d 60 (1968). Attorney Wright's letter of August 12, 1985, does not rise to the level necessary to imply an intentional waiver of the carrier's right to set off against future benefits.

9. The claimant also asserts that the carrier should be estopped from claiming a set off on the basis of Attorney Wright's August 12, 1985 letter. A party invoking estoppel must show that the party to be estopped knew certain facts, intended his conduct to be acted upon by the party asserting the estoppel, and the party asserting estoppel was both ignorant of the true facts and relied on the conduct to his detriment. Greenmoss Builders, Inc. v.

King, 155 Vt. 1, 580 A.2d 971 (1990). The evidence in this case is insufficient to meet this burden of proof.

10. The claimant has requested an award of attorney's fees. The purpose of 21 V.S.A. § 678(a) is to discourage any unnecessary expense and unreasonable delay in the resolution of the workers' compensation claims. Morrisseau v. Legac, 123 Vt. 70, 79, 181 A.2d 53 (1962). An award of attorney's fees is discretionary under 21 V.S.A. §678(a). The claimant is, by this Order, awarded recovery for all medical services and supplies he has requested in this hearing. As to this amount of recovery, claimant is entitled to recovery of attorney's fees consistent with Rule 10(a).

ORDER

It is therefore ORDERED that the defendant immediately pay to the claimant the following:

1. Medical and hospital benefits in the total amount of $4,521.77;

2. Attorney's fees of $904.35;

3. All other benefits under the Workers' Compensation Act consistent with this Order, including the cost of surgery if the claimant elects to have surgery performed as recommended by his physicians, and any temporary disability compensation during the surgery recovery period.

It is further ORDERED that the remainder of the claims are DENIED. The defendant is entitled to set off a total of $25,000.00 against all benefits to be paid pursuant to this Order.

December 29, 1993

Barbara G. Ripley

Barbara G. Ripley, Commissioner